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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL CO.,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

**In Opposition to Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

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**In Opposition to Petition for Writ of Certiorari to the
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I. Reply to Respondent's Counterstatement of Facts and Argument as to Sufficiency of the Evidence.

The first question presented in UMW's Petition for Writ of Certiorari is whether there is sufficient evidence to sustain the jury's finding that UMW conspired with major coal producers to impose a ruinous wage standard on Scotia in violation of the Sherman Act. UMW contends that the evidence, considered either as a whole or piece by piece, at *most* gives rise to equally plausible inferences of illegal conspiracy on the one hand, and lawful coincidence of motives on the other. Consequently, under

the "equal inference" rule of law, Scotia failed to meet its burden of proof, the jury had no room to speculate, and the District Judge, *as a matter of law*, was obligated to direct a verdict for UMW.

In its Petition, UMW analyzed the cases in point in some detail, pointing out that the four "areas" of evidence cited by the District Judge as sufficient to support the jury verdict, have been held by other Courts to be at most equal inference evidence, incapable of supporting an inference of UMW-Employer conspiracy, as a matter of law.

Scotia's response is an express refusal to meet the issue at all, terming it a "waste of time" (Respondent's Brief, 36). Scotia maintains that UMW presented the facts "in a way to make its contentions plausible" (R.B., 36), "bending the facts" to fit its contentions (R. B., 36), and "completely ignoring the bulk of the record on conspiracy" (R. B., 35).

Scotia's ARGUMENT consists of one-half page in support of the District Judge's charge to the jury (never in issue), three pages of quotations from the District Judge's opinion, and one and one-half pages explaining that the sufficiency of the evidence question raised by UMW is a "waste of time" and unworthy of examination.

Without one word of analysis of the equal inference rule, Scotia relies instead on a twenty-five page COUNTERSTATEMENT OF FACTS (R.B., 5-31), discussing evidence in the record which Scotia represents to be "new evidence introduced for the first time from Minutes of meetings and public statements" proving the conspiracy beyond question and rendering UMW's argument about coincidence of motives and equal hypothesis "meaningless" (R. B., 35).

UMW agrees that this Court cannot determine whether the evidence is sufficient to support the jury's verdict without first

determining what the evidence is. UMW categorically denies Scotia's allegations that it distorted facts in its Petition. It is significant that Scotia cites not one single specific inaccuracy or misrepresentation. UMW also emphatically denies that it ignored the bulk of the evidence as alleged by Scotia. In its Petition, UMW focused appropriately on the four "areas" of evidence cited by the District Judge as sufficient to support the jury's verdict, illustrating with arguments and legal authority that each "area" is no more than equal inference evidence.

UMW contends that an examination of Scotia's COUNTERSTATEMENT OF FACTS will reveal that the omissions, overstatements and outright misrepresentations of fact are found there, and not in UMW's Petition.

To begin with, Scotia has claimed that this record contains new evidence never before considered in any of the related conspiracy cases, which proves the conspiracy beyond question. This alleged new evidence is in the form of "certain newly discovered Minutes of meetings, correspondence and testimony of actual participants" (R. B., 32).

The same evidence was offered by the plaintiff in the second *Ramsey* case (*Ramsey v. UMW*, 344 F. Supp. 1029, at 1038) in a motion to reopen the proof. In refusing to admit this evidence, District Judge Wilson reasoned as follows:

"The Court has read and considered all of this evidence. Although voluminous, it is in very substantial measure cumulative to the proof offered upon the trial. The newly offered evidence offers no new theories of liability and presents no significant alteration of the evidence as presented upon the trial."

Obviously, this new evidence did not sway Judge Wilson from his decision that:

"The Court can only conclude that the evidence weighs no less equally in favor of a unilateral action on the part of the Union than it does in favor of conspiratorial action on the part of the Union." (1038)

This is the proper view, UMW submits, of what Scotia chooses to call new and overwhelming evidence of conspiracy. It should be remembered that the District Court advanced four specific areas of evidence which it felt might support the jury verdict, and UMW discussed each specifically in its Petition, illustrating with clear legal authority why each must, as a matter of law, be considered no more than equal inference evidence. Scotia absolutely fails to refute or even consider this issue, and instead relies on sweeping and nebulous references to "abundance of evidence" (R. B., 36). By an accumulation of statements taken out of context, many of which were made years before the alleged conspiracy by persons no longer living or connected with the coal industry by the time of the strike in question, and by drawing inference upon inference, Scotia seeks to obscure the fact that there is not one single item of evidence from which the jury could distinguish a conspiratorial motive from a lawful coincidence of motive.

Furthermore, Scotia's COUNTERSTATEMENT OF FACTS is simply not accurate. For example, Scotia states that Mr. George Love, former head of Consolidation Coal Company, "testified he had a desire to do what he could to see that no competition paid lower labor costs than Consolidation paid regardless of the competitor's circumstance or mode of production" (R. B., 8). A reading of what Mr. Love actually did say, taken from the reference cited by Scotia (92a-93a), reveals a glaring misrepresentation:

Q. Mr. Love, in this period of time were you also concerned that of the companies, competitors in the industry not have a lower wage scale than Consolidation Coal Company? A. That is right.

Q. Did you have a desire if you could avoid it to see that other companies did not pay a lower wage scale than you at Consolidation? A. I didn't think that was up to me. I certainly didn't want to see other companies pay lower wage scales but there was nothing I could do about it, if they did.

Q. Did you have a desire that this not be done if you could avoid it? A. There was no way to avoid it. I have answered that already. Of course, nobody, including you, you wouldn't want some lawyer next door offering your services cheaper than you were offering yours, would you? That is true of our competitors. We didn't want them to pay less wages than we were paying.

Q. I refer to page No. 405, 408 and 409—page 25 of 405 question: did you have a desire and a purpose to get around the possibility of any competitor in the coal industry paying a lesser wage than you paid? A. I don't know what you mean by 'purpose' but I will say that I had a desire. I had the desire that wages of people that I was competing with would be somewhere in the neighborhood of the wage that I was paying. That's a normal situation in any industry, the automobile industry, the steel industry or any other industry. You don't want to be in a position if you could avoid it where your neighbor has a direct advantage over you.

Q. Would this be true regardless of mode of production of your neighbor or the ability of the neighbor to pay the same wages that you could pay? A. That isn't—let me answer it. I think I answered it before but you don't want your neighbor if you can avoid it to have any advantage over you. You want to be able to compete freely and easily with him and, by golly, you don't want him to have a lower wage scale than you if you could avoid it. I would accept all of this testimony so far as you like. It is in the record. I testified to it and I still believe it.

Far from supporting Scotia's statement that Mr. Love wanted to do what he could to see that no competition paid lower labor costs than Consolidation, his testimony indicates that a lower wage scale by competitors of Consolidation did not make him happy, but that he certainly did nothing and could do nothing to avoid it.

This is not an isolated instance. On page 6 of its Brief, Scotia states that "in 1948 and 1949 the growing threat that the industry would become concentrated into a small number of major producers caused violent reaction from UMW," citing pages 78a through 82a. When those pages of the Appendix are reviewed, it is apparent that once again Scotia has, at the very least, made a sweeping overstatement.

Scotia would have the Court believe its contention that "UMW's policies dramatically shifted and changed in 1950. Before 1950 UMW's prime basic policy was the promotion of equality in work opportunity among all of its members with the accompanying and necessary corollary of competitive equality among the coal producers of the industry." (R. B., 6). According to Scotia, beginning in 1950, UMW actively conspired with large coal producers to promote mechanization to obtain a higher wage scale.

Scotia contends that "it became the policy of UMW to have the production of coal taken over by big combines and bring about concentration in the industry and this was largely achieved (65a, 188a-189a, 190a-191a)" (R. B., 10).

The portions of the record cited by Scotia, particularly statements of John L. Lewis, actually reveal that mechanization was an inevitable result of economic forces not within the control of UMW, and that the statements by Lewis simply evidenced recognition of the trend toward mechanization, and certainly did not evidence any "radical" change of policy to "bring about concentration in the industry":

By Mr. Rountree: Yes. A reprint. A reprint from the U. S. News and World Report in the United Mine Workers Journal. And it includes a statement by Mr. Lewis on this subject. Quoting: "It has been a matter of common sense and leadership, the coal industry developed a more stable and responsible leadership than was possible in the earlier years. There formerly was a multiplicity of producing units in the industry, leading to destructive competition in the most violent form. Most producers then were small. Each produced only a small portion of the total coal output. That situation held progress back. There was no responsible leadership that could speak for the whole industry or for any substantial area of the industry. There has been great progress in modernization of the industry in recent years. It has resulted in concentration of a greater proportion of the production in larger corporate units. The coal operators developed a new leadership with a constructive outlook and a greater sense responsibility. They came to the realization that common sense procedures were better than the old methods and with the concentration of production in fewer hands, they had more influence in the industry."

By Mr. Combs: Continue the reading: "Was there a change in attitude also on the part of the union? No. There was no change on our side. We always have favored mechanization of the coal industry in contradistinction to Great Britain, where the union has opposed it. . . ."

Scotia quotes other evidence out of context in an attempt to substantiate its theory of a radical shift in UMW policy in 1950 explained only by an illegal conspiracy with the large operators. For instance, it emphasizes a statement of Mr. Harry Moses of BCOA, in which he described his relationship to the industry and to the union as being part of a "quest for stability", implying a secret and unlawful combination. This ignores the

clear evidence that this and similar "stability" statements relied on by Scotia had reference to the stability of the work force and the elimination of the long strikes and turmoil in general that had characterized the coal industry of the 1940's. George Love so testified (363a) and added that coal operators signed the 1950 Agreement not as a matter of conspiracy, but to avoid worse alternatives, such as further loss of markets, or government take-over (359a, 360a).

Despite Scotia's claim to the contrary, it has been recognized by the District Court in *Ramsey* (344 F. Supp. 1029, 1037) that "it appears clear from the evidence that national uniformity in wage rate in labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890."

Perhaps the most striking example of the type of unsupported inference advanced by Scotia concerns its comments on the 80-cent clause at page 25 of its Brief. UMW has consistently maintained that nothing in the PWC can be taken to evidence a conspiracy, but also argues that in the event the PWC could be read to support a finding of conspiracy, that finding would not apply here because the PWC was removed from the contract in 1964 and, indeed, the 80-cent clause in the 1964 Contract superseded the PWC.

Without a single word of testimony to support its position, and without reference to the record, Scotia boldly proclaims that UMW and large coal operators "used" the beginning language of the 1964 agreement "to make it possible for them to claim later, if they should get in trouble, that they had taken PWC out of the Contract . . ." (R.B., 25). UMW submits this is typical of the kind of overstatement and misstatement that is repetitiously found in this case. What happened was very simple. As in earlier amendments to the 1950 agreement, certain provisions of the basic agreement and the amendments were car-

ried forward. Other provisions were not carried forward and therefore ceased to exist. The 1964 amendment¹ did not carry forward the PWC and it ceased to be a part of the contract. Yet the plaintiff was permitted to invite jury speculation that PWC continued in effect and plaintiff continues to argue the same thing to this Court!

Scotia thus attempts to avoid discussion of the issue of law involving sufficiency of the evidence with a staggering accumulation of such speculative inferences. Scotia avoids the legal argument because it has no answer to the authority presented in the Petition by UMW.

Scotia's comment on the law, to the extent that it comments at all, is simply a listing, without analysis, of related cases in which jury verdicts of conspiracy were returned. It attempts no response to UMW's detailed analysis of those cases, which analysis leads to the inescapable conclusions that this Court has never specifically passed on the question of the sufficiency of circumstantial evidence to support an inference of conspiracy (Petition, 18), that the equal inference rule was not at issue in either *Tennessee Consolidated Coal Company v. UMWA*, 416 F.2d 1192 (6th Cir., 1969), cert. denied 397 U.S. 964, or *UMW v. South-East Coal Company*, 434 F.2d 767 (6th Cir., 1970), cert. denied 402 U.S. 983, two 6th Circuit cases cited by Scotia in support of its verdict, and that the Second *Pennington* (257 F. Supp. 815) and the Second *Ramsey* (334 F. Supp. 1029) cases were decided on the equal inference rule as a matter of law, and are tantamount to a directed verdict in a jury case (Petition 20-21).

It is especially appropriate that this Court consider at this time the extent to which a jury may infer an anti-trust conspiracy

¹ The National Bituminous Coal Wage Agreement of 1950 and the 1951, 1952, 1955, 1956, 1958, and 1964 Amendments are to be found as Exhibits 14, 24, and 28, but they have not been printed in the Joint Appendix.

from indirect, circumstantial evidence. Recently, more and more legal scholars, as well as litigants, have raised questions about the ability of a jury to assess complex factual situations in anti-trust cases.

Because the application of the equal inference rule to the evidence generated in this case is a serious matter and not the "waste of time" Scotia terms it, the writ should be allowed.

II. Reply to Respondent's Argument as to Scotia's Ability to Pay

UMW has shown that in negotiations between Blue Diamond President Bonnyman and UMW Vice President Titler, Bonnyman stated that Scotia was able to meet the UMW agreement and would do so if UMW would agree not to attempt to organize Blue Diamond's Leatherwood mine, which was then operating under the Southern Labor Union.

We reply to Scotia's various responses:

1. Scotia points out that the Bonnyman testimony came from a deposition in another case "which did not pertain to the Scotia Mine (R.B., 37)."² Elsewhere, Scotia argues the deposition had to do "with an entirely different case and a different time" . . . (R.B., 41). The testimony did indeed come from another case—*Blue Diamond Coal Company v. UMW*, Civil No. 6189, U. S. District Court, Eastern District of Tennessee. The case was, however, an antitrust suit based on the same theory as the instant case, except that it involved the Leatherwood mine rather than the Scotia mine. As Bonnyman's lengthy deposition shows (280a-305a), the questions asked dealt with

² That Bonnyman's testimony came from a deposition in another case hardly made it novel. Much of the testimony in the instant case had been given in prior cases and was read herein pursuant to stipulations of counsel.

the conspiracy issues. There was nothing in that case or in the Bonnyman deposition that in any sense dilutes the relevance of the testimony on the Bonnyman-Titler discussions. The testimony is clearly and directly in point. The deposition, among other things, dealt with the Scotia-UMW negotiations involved in this case.

2. Throughout its argument of Question No. 2 Scotia contends that since Scotia mine was the source of Blue Diamond's profits—upon which the Leatherwood mines, the Scotia mines, and the Blue Diamond stockholders were dependent (R.B., 39)—it was entirely legitimate to tie the Scotia negotiations to the Leatherwood operation. And this is precisely what Bonnyman did. UMW was given the choice of its standard contract with the tie or a low-wage contract without it. Certainly the condition was not legitimate bargaining in a labor-law sense, for it did not relate to the conditions of employment of the Scotia employees—the only employees of the Blue Diamond complex UMW was certified by the NLRB to represent. The Scotia contention (R.B., 41) that Bonnyman was simply demonstrating a willingness to bargain as "required by labor law," is simply without merit. Scotia had no more right to tie its bargaining position to Leatherwood than UMW would have had if it insisted upon recognition at Leatherwood as a condition to reaching agreement at Scotia. *NLRB v. Electrical Workers* (5th Cir., 1959), 266 F2d 349, *NLRB v. George P. Pilling & Son Co.* (3rd Cir., 1944), 119 F2d 32. The illegality of the condition is, moreover, heightened by antitrust considerations. Indeed, there is a special irony in Scotia's position, for Scotia's basic contention is that UMW agreed with one bargaining unit on what it would insist upon in negotiations with other bargaining units. Yet, here Scotia was attempting to use its leverage to keep secure a competitively favorable wage standard at a different bargaining unit. Scotia's position calls forcibly to mind the following language from *Pennington* (381 U. S. 668):

One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another.

Scotia was doing precisely what it said BCOA was doing, except the other way around. UMW contends the alternatives posed by the Scotia offer precludes a finding of conspiracy in the instant case.

3. Scotia argues (R.B., 40-41), that Bonnyman was not willing to sign a contract with UMW because he was concerned with having to pay some \$2,000,000 on coal mined at Leatherwood by reason of the so-called 80-Cent Clause (186a-187a). The argument is without merit. In the first place the 80-Cent Clause, had Scotia signed the UMW contract, would have had no application to coal mined at Leatherwood and sold to others. Blue Diamond's Leatherwood operation, under contract with the Southern Labor Union, would have been in no different posture than it was before. In the second place, in no way may Bonnyman's testimony be given this interpretation. This is not what he told Titler. Bonnyman told Titler if the United Mine Workers would "leave us alone in the Leatherwood field and *if we could work out some of the local problems at Scotia, that we would sign the contract . . .*" (299a-300a). To elevate a request for resolution of unstated "local problems" into concern over a strained application of the 80-Cent Clause involving \$2,000,000 a year is a bootstrap argument of the first order. The critical condition in the Bonnyman approach was not "local problems" but rather the demand that UMW "leave us alone" at Leatherwood. The meaning of the testimony is unmistakable.

4. Scotia argues (R.B., 43-44) the anti-trust laws do not require a violation to be "ruinous" as a basis for liability. The argument misses the point. In *Ramsey*, the Supreme Court said a union would be liable if, by agreement, it insisted upon wage standards "ruinous to the business" of the employer, 401 U.S. at 314. Here, UMW was dealing with a successful, highly mechanized, well-financed company, and, significantly, one which told it, in plain words, that it could meet the UMW contract. Our argument is that a conspiracy may not be found in these circumstances and that a union is not required to offer a different or lower scale where, as here, the employer has said, "I can pay, but I don't want to." The added costs UMW's contract would have imposed were well within the profit Scotia claimed for the twelve months prior to the strike. The fact the return on Blue Diamond's investment in the Scotia mine (not disclosed in the record) would have been less than before is the normal consequence of any successful union negotiation. The argument demonstrates that this case goes far beyond the situations contemplated in *Pennington* and *Ramsey*.

Respectfully submitted,

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